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Supreme Court, U.S.
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No. 99-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NEO GEN SCREENING, INC.,
Petitioner,

v.

NEW ENGLAND NEWBORN SCREENING PROGRAM, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Whether the United States Court of Appeals for the First Circuit correctly concluded that, in promulgating regulations for screening newborn children for certain disorders in the Commonwealth of Massachusetts, the Massachusetts Department of Public Health was exempt from the operation of section 2 of the Sherman Act.[1]

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[1] The petition suggests that the Court of Appeals resolved an Eleventh Amendment issue in this case. Petition for Writ of Certiorari ("Pet.") at i. To the contrary, the Court expressly declined to reach the Eleventh Amendment issues because petitioner conceded on appeal that the University of Massachusetts was entitled to the protections afforded by the Eleventh Amendment. Appendix A to Pet. at 6-7.

Parties.

The petition states that the Massachusetts Department of Public Health (the "Department") is a respondent in this case. Pet. at ii. To the contrary, the Department was never named as a party to this litigation. Appendix A to Pet. at 2-3. The parties are Neo Gen Screening, Inc, petitioner; and the University of Massachusetts; the University of Massachusetts Medical Center; the New England Newborn Screening Program; Howard Koh, M.D., Commissioner of the Department; and Ralph Timperi, Assistant Commissioner of the Department, respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondents New England Newborn Screening Program, the University of Massachusetts, the University of Massachusetts Medical Center, Howard Koh, and Ralph Timperi (collectively "respondents") submit this brief in opposition to the petition for writ of certiorari.

Decisions Below

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1-12 of Appendix A to the petition, is reported at 187 F.3d 24 (1st Cir. 1999). The earlier decision of the United States District Court for the District of Massachusetts is unreported, and it is included in Appendix B to the petition at pages 13-18.

Jurisdiction

The opinion of the United States Court of Appeals for the First Circuit was entered July 14, 1999. See Appendix A to Pet. at 2. The petition was filed October 7, 1999, was received by respondents on October 11, 1999, and was docketed on October 12, 1999. The petitioner invokes the Court's jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2106.

Constitutional and Statutory Provisions

The federal constitutional and statutory provisions at issue are the Supremacy Clause of the United States Constitution, and section 2 of the Sherman Act, 15 U.S.C. § 2.

The Supremacy Clause provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

Section 2 of the Sherman Act provides as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,0000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

As to the relevant Massachusetts statutes, the Commonwealth sets forth the full text of Mass. Gen. Laws c. 111, §§ 4E and 110A, as follows:

> Section 4E. The department of public health is hereby authorized and directed to establish a program to combat mental retardation in children suffering from a genetic defect causing phenylketonuria. The said program may be conducted in conjunction with any foundation or scientific organization, hospital or medical school or with an agency of the federal government. The department may accept for such purpose any special grant of money, services or property from the federal government or any of its agencies or from any such foundation, organization or medical school.

> Section 110A. The physician attending a newborn child shall cause said child to be subjected to tests for phenylketonuria, cretinism and such other specifically treatable genetic or biochemical disorders or treatable infectious diseases which may be determined by testing as specified by the commissioner. The commissioner may convene an advisory committee on newborn screening to assist him in determining which tests are necessary.
>
> The department shall make such rules pertaining to such tests as accepted medical practice shall dictate.
>
> The provisions of this section shall not apply if the parents of such child object thereto on the grounds that such test conflicts with their religious tenets and practices.

The Massachusetts regulation at issue is 105 Code of Massachusetts Regulations § 270.007(B) which states:

> The blood specimen shall be collected from the newborn using the form and filter paper provided by the Department, and delivered to the Department within 24 hours of collection according to the accompanying instructions or directions provided on the form and other supplemental information that may be provided by the Department. All information requested

must be provided on the form.[2]

Statement of the Case

I. PROCEEDINGS BELOW.

Petitioner Neo Gen Screening, Inc., challenged regulations promulgated by the Massachusetts Department of Public Health (the "Department") on the grounds that they violated section 2 of the Sherman Act.[3] It claimed that the regulations, which require that certain newborn screening[4] be conducted by the Department or by the Department's designated agent, constituted a form of illegal monopolization.[5]

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[2] 105 Code of Massachusetts Regulations § 270.004 defines "Department" as the Department or its designated agent.

[3] The Sherman Act provides in relevant part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2. Petitioner's apparent reliance on section 1 of the Sherman Act, 15 U.S.C. § 1, is puzzling, since its claim is one of monopolization.

[4] Newborn screening is a process by which newborn children are tested for certain inheritable disorders. Appendix B to Pet. at 14.

[5] Petitioner maintains at page 4 of the petition that the 1989 proposed regulations for the first time created a monopoly by

The petitioner appealed from the District Court's decision granting the respondents' motion to dismiss the amended complaint. The United States Court of Appeals for the First Circuit affirmed the District Court's decision. The Court of Appeals held that, because the Department, an executive department of state government, had acted as the state in promulgating the regulations, the Department was exempt from the Sherman Act's prohibitions, without further inquiry. Appendix B to Pet. at 8-9.

The petitioner filed a petition for writ of certiorari on or about October 8, 1999.

Reasons for Denying the Writ

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Supreme Court Rule 10. The Court will grant such a writ "only for compelling reasons." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892). Accordingly, a "petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10.

For the reasons set forth below, the petition does not satisfy the traditional criteria which guide the Court's discretionary

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the Department of certain newborn screening. This is incorrect. Since at least 1962, certain newborn screening in the Commonwealth has been performed by the Department or its designated agent. Appendix B to Pet. at 14, 16.

review, and it should be denied.

I. THERE IS NO SUBSTANTIAL CONFLICT OF DECISIONS TO WARRANT CERTIORARI.

A. *The Parker Immunity Doctrine Exempts the Department's Regulations from the Sherman Act.*

"Under principles of federalism and state sovereignty, a state actor is accorded absolute immunity from antitrust liability." Hertz Corp. v. City of New York, 1 F.3d 121, 128 (2d Cir. 1993), cert. denied, 510 U.S. 1111 (1994).

> A half century ago, the Supreme Court determined, in Parker v. Brown, 317 U.S. 341, . . . (1943), that Congress had not intended the federal antitrust laws to apply to trade restraints or monopolies imposed by state governments. Although the antitrust laws aim at competitive markets, the Court in Parker recognized that governments often restrict competition for public purposes. The actions of state governments, no less than those of the federal government itself, were deemed not to fall within the constraints of the antitrust laws.

Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1076 (1st Cir. 1993). "[W]hen a state legislature adopts legislation, its actions constitute those of the State, . . . and ipso facto are exempt from the operation of the antitrust laws." Hoover v. Ronwin, 466 U.S. 558, 567-68 (1984). In Hoover, the Court stated that the "reason that state action is immune from Sherman Act liability is not that the State has chosen to act

in an anti-competitive fashion, but that the State itself has chosen to act." Id. at 574. Similarly, the First Circuit in this case determined that, when an executive department of the Commonwealth promulgates regulations limiting the provision of certain newborn screening services to the Department or the Department's designated agent, it is protected under Parker. Appendix A to Pet. at 8-9.

In this case, the Department determined that the provision of certain newborn screening services in the Commonwealth could be done most effectively where the state provides that service itself, either by the Department or by the Department's designated agent. This is not "illegal" under the antitrust laws. The state has expressed a preference for (1) newborn screening services (2) to be provided by the Department as the Department sees fit. This activity, even if "anticompetitive" in some sense, is nonetheless by definition authorized by the state. Therefore, no "violation" of the antitrust laws exists.

Under Parker, and its progeny, even when a private actor (of which there are none in this case) engages in anticompetitive conduct, he receives immunity from the antitrust laws (1) if he engages in the activity pursuant to a clearly articulated and affirmatively expressed state policy and (2) if the anticompetitive activity is actively supervised by the state. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). However, some entities and persons are not subject to both prongs of the Midcal test. For example, in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), the Supreme Court held that municipalities were subject only to the "clear articulation test" and not the active

supervision test.[6] Here, the Court of Appeals held that neither prong of the state action doctrine applies to an executive department, which the Court held to be the equivalent of the state when it promulgates regulations. Appendix A to Pet. at 8-9.

B. *No Real and Embarrassing Conflict Exists Among the Circuits Which Have Decided this Issue.*

The petition asserts that there is a conflict among the circuit courts concerning the question of whether a state executive department is, like a state, ipso facto immune from the operation of the antitrust laws, or whether it is, like a municipality, subject to the foreseeability test embodied in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). Pet. at 7.

The First Circuit's decision that state executive departments are not subject to the Sherman Act is consistent with earlier decisions by the Courts of Appeal in the Fifth and Ninth Circuits. See Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987); Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973). The only case that plaintiff relies on to establish a conflict with the Neo Gen decision, Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986), Pet. at 7, was subsequently interpreted by the United States Court of Appeals for the Second Circuit in a way which lessens any perceived conflict between it and cases in the Fifth and Ninth Circuits cited by the First Circuit.

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[6] Petitioner's suggestion to the contrary, Pet. at 17-18, is simply wrong. Town of Hallie, 471 U.S. at 47.

In Charley's Taxi, a case involving the Hawaii Department of Transportation, the United States Court of Appeals for the Ninth Circuit held that "state executives and executive agencies, like the state supreme court, are entitled to Parker immunity for actions taken" within their lawful authority, regardless of whether the particular actions at issue or their anticompetitive effects were contemplated by the legislature. 810 F.2d at 876. The Court did not address the question of whether state entities that were less than executive agencies would partake of that immunity. In Saenz, the United States Court of Appeals for the Fifth Circuit held that the University Interscholastic League is an agency of the State of Texas and therefore exempt from section 1 of the Sherman Act. 487 F.2d at 1027. The Court analyzed the League's organizational form and function as part of the University of Texas, an arm of the State, and concluded that it was sufficiently tied to the state to constitute the state for antitrust purposes. 487 F.2d at 1027-28. Again, the Court did not address the nature of agencies in general.[7]

In Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986), the United States Court of Appeals for the Second Circuit held that the Urban Development Corporation of New York State was not exempt from the Sherman Act as if it were the state, but rather was required to demonstrate a "clearly expressed state policy that authorizes its actions." 790 F.2d at 1043 (quotation

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[7] Compare Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033 (5th Cir.) (so long as Board is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority), cert. denied, 119 S. Ct. 444 (1998).

omitted). Twelve years later, in Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc., 155 F.3d 59 (2d Cir. 1998), the court clarified its holding in Cine 42nd Street. In Automated Salvage Transport, the court stated that that its holding in Cine 42nd Street was based on the fact that New York's Urban Development Corporation had nearly absolute operational autonomy and because a high level of participation by the state was missing. 155 F.3d at 71. In Automated Salvage, the Second Circuit held that those characteristics did not apply to the Connecticut Resources Recovery Authority because the Authority was subject to regulation by the state's Commissioner of Environmental Regulation. 155 F.3d at 71. The Court held that this fact could be a basis for a determination that the Authority was the equivalent of the state for purposes of the antitrust laws. Id. It left this question open, holding ultimately that the Authority's activity was exempt under the foreseeability test. 155 F.3d at 74.

These holdings can largely be reconciled by recognizing that state agencies possess different characteristics such that some of them will be exempt from the antitrust laws, while others might have to demonstrate that their activities were the clearly foreseeable result of a legislative command.[8] The First Circuit's Neo Gen holding is an example of the application of this principle. Neo Gen held that the Department's immunity did

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[8] Indeed, when a state agency acts, it is arguably entitled to even more protection than that afforded municipalities by the Hallie test. It would be inconsistent with Parker -- which rests on principles of federalism -- to give less (or even the same) protection to states which are, unlike municipalities, protected by the United States Constitution.

not depend on the foreseeability test because it is a full-fledged executive department, Appendix A to Pet. at 11, but it left open the question of whether there may be instances where a state entity may not merit treatment as the state for antitrust purposes. Id.[9] It is important to note that the Court also regarded the foreseeability test as having been met, in stating that "[g]iven the Commonwealth statutes that authorized [newborn] testing, there is nothing extraordinary or unforeseeable about the Department of Public Health's regulation requiring testing or its decision to do the testing itself or through a chosen instrument. Even if a patent lack of authority could ever be an exemption to Parker, it is certainly not so in a case of this kind." Appendix A to Pet. at 11.[10] Thus, no substantial conflict exists among the cases cited by petitioner.

To the extent that there is any perceived conflict among these decisions, this does not support plenary review at this time. See Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955) (conflict in lower courts will not justify review unless it is "real and embarrassing") (emphasis added) (citation omitted).

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[9] The cases petitioner cites at 13 n.8 and 14 n.9 are illustrations of this principle.

[10] See Mass. G.L. c. 111, §§ 4E and 110A.

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

Because the challenged regulations do not conflict with the Sherman Act, either because, under Parker, the Sherman Act does not apply or because the foreseeability test is met, this case presents no significant issue of federal law requiring resolution by the Court.[11] Neo Gen is perfectly consistent with this Court's prior decisions in this area. "The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 375 (1991).[12]

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[11] Petitioner's claim that the New England Newborn Screening Program is a private entity, Pet. at 16, is simply incorrect. As the First Circuit noted in its opinion, "[a]lthough named as a defendant, the Screening Program is simply a program at the University of Massachusetts conducted through its medical school, which is also not a separate corporation." Appendix A to Pet. at 3, n.1.

[12] While dictum in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), left open the question of whether and to what extent a state agency might be subject to at least one prong of the state action doctrine, foreseeability and active supervision, that case involved a municipality, not a state agency. In the absence of a real, substantial conflict, the issue of the validity of the Department's regulations is not an issue of national importance, warranting the review of this Court.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

NEW ENGLAND NEWBORN SCREENING PROGRAM, et al.

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